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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

COPPERWELD STEEL COMPANY and BALTIMORE & OHIO RAILROAD COMPANY,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Western District of Pennsylvania.

BRIEF OF APPELLANT COPPERWELD STEEL COMPANY IN OPPOSITION TO MOTION TO AFFIRM.

STATEMENT.

Appellants Copperweld Steel Company and Baltimore & Ohio Railroad Company filed their joint Statement as to Jurisdiction under Rule 12 of this Court under date of August 12, 1952. The Interstate Commerce Commission,

Defendant-Appellee, filed its Motion to Affirm the decree of the three-judge statutory court below on September 8, 1952.

The instant Brief of Appellant Copperweld Steel Company in opposition to the Motion to Affirm is in response to the Motion and will disclose the basis and reasons for the denial of the Motion, as well as the important reason for review by this Court.

ARGUMENT.

The questions decided by the Interstate Commerce Commission and approved by the three-judge statutory court below (upon at least a partial misapprehension of the facts as recited in that Court's opinion and discussed below) are of substantial importance to the nation's railroads and to industry in general. A reading of the Motion to Affirm, filed here on behalf of the Interstate Commerce Commission, discloses many inaccuracies of facts, and implicit arguments based thereon which, we believe, were erroneously accepted by the Commission and the Court below.

This case involves a modern steel plant with its trackage, yards, and scales especially designed, [in cooperation with impartial experts], for the very purpose of adhering to and conforming with the applicable rules and principles of the Interstate Commerce Commission in this class of cases. A clarification of those principles, in the light of the facts and circumstances involved here, is needed, we submit, in the interests of all parties.

A clarification of the principles of the Administrative Procedure Act, as that act is applicable to the practices of the Interstate Commerce Commission, would appear to be highly desirable in the light of the Commission's decision herein. The Commission's decision here in effect ignores the Examiner's findings, ignores a substantial part of the detailed and undisputed evidence, and is based upon general conclusions, summary in fashion, *which are not supported*

by the evidence, and, indeed, are contrary to the evidence. This question alone, it is submitted, justifies review by this Court.

The instant case is not just another decision in the line of cases beginning some seventeen years ago with *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, as Government counsel would have this Court believe, but represents a situation in which the Interstate Commerce Commission has extended furtherest its proclaimed doctrine of disallowance of terminal services by carriers to any but the simplest team track switching. Moreover, in the instant case the Commission's final order effectively denies to appellant industry any switching and placement service of inbound and/or outbound cars; the Commission's order is contrary to the findings and recommendations of its own Examiners who heard the evidence and were most familiar with the facts involved;[1] and the Commission's order should be enjoined and set aside for lack of substantial evidence.

The undisputed facts are that the industry here, at the outset of its industrial operations, working in cooperation with the engineering department of the carrier did, in the years 1942, 1943, and 1944, design, lay out, and construct the industry's tracks and yards for the very purpose of complying with the Interstate Commerce Commission's principles and rules as announced and enforced in its proceedings known as Ex parte 104, 209 I. C. C. 11, affirmed by this Court in the *American Sheet & Tin Plate* case, supra, and other cases. This Court should recognize the difference between such a case and the score of cases

[1] Although requested, no argument was ever permitted before any members of the Commission and the Final Report of Division Three, upon which the Commission's final order is based, represents in large part a rejection of the Examiner's findings and final conclusions and is clearly contrary to the evidence and to the findings of the Examiner.

passed upon by the Courts wherein the yards and tracks of the industries involved had grown up and been added to over many years of piece-meal construction. In short, appellant industry's yards, tracks, and points of delivery and pickup were in the first instance especially and carefully designed to meet the precise rules and principles previously announced by the Commission and this Court in the line of cases referred to in Appellant's Statement as to Jurisdiction and by Appellee Counsel in the Motion to Affirm. Also, the record supports Appellant industry's representations here that its plant practices conformed to the Commission's rules and principles in this class of cases.

Furthermore, in most of the decided cases the industries and plant yards and tracks were served by more than one carrier. Here, the single carrier involved, working closely with the industry, had carefully and deliberately taken all steps to comply with the Commission's principles and rulings.

The Interstate Commerce Commission, in its Motion to Affirm, has gone to great, and, we submit, questionable lengths and representations to avoid review by this Court. For example, while the Commission's basic, primary, and general finding and conclusion herein (and contrary to the Examiner's findings) that "Interference by industry power or equipment is inherent where, as here, switching is being performed concurrently by respondent (railroad) and the industry." *was plainly a Commission finding in support of its conclusions and order,* counsel for the Commission here attempts to avoid the weakness of the Commission's position by designating the above-quoted finding and conclusion as "neither a subordinate nor ultimate report finding." (Motion to Affirm, page 10). We submit that a Government agency should be more interested in a correct and proper application of the governing principles rather than an attempt to win all of its cases.

Another instance of such a representation by Commission counsel appears on page 10 of its Motion to Affirm wherein it is stated:

> "It is supposed that in the situation here involved, where industry controlled its own engine operations and directed the plant switching of the B. & O. engines, through oral and written instructions issued by its yardmaster, the plant services so closely coordinated under industry control would avoid interference as between the various engines performing the service. Such coordination and direction of carrier switching by industries has been repeatedly held to be evidence of standby railroad engine service in plant spotting one of the principal fact standards, as applied in Ex parte 104 supplemental proceedings, upon which carrier plant spotting has been condemned by the Commission and Courts. What the report stated herein *was not a finding as appellants claim*, but rather a general comment, unimportant if not unnecessary to the conclusions and findings made, to the effect that interference by industry power is inherent where switching is performed by carrier and industry concurrently. And that is legally correct where, as here, the switching of both is coordinated under the direction and control of industry." (Emphasis supplied)

The true and undisputed facts are that in four days of meticulous inspection by three Commission inspectors who checked every car from 7:45 a. m. until 4:30 p. m. covering the minute to minute movement of the B. & O. locomotive, the Copperweld locomotive, the B. & O. cars and the Copperweld cars, their report shows that in these four days there was only one instance when the B. & O. locomotive had to stop because of the interference or presence of the Copperweld equipment and that one instance lasted for seven minutes. (Exhibit 31). Such an incident is far from the inherent interference inferred by the Commission in the present case and far from the typical circumstances present in other cases decided by the Commission and the Courts.

Moreover, the "plant spotting" to which Counsel ingeniously refers is done by *industry* power and equipment, whereas the carrier *placement* and *pickup* is done by the carrier crews *at their own convenience,* and not "under the direction and control of the industry," as is done in any simple or team-track switching.

We submit that both Counsel's representations of the facts and the argument based thereon are untenable, contrary to the evidence, and, under the circumstances, specious and misleading.[2]

But, more important than Counsel's representations and arguments, as disclosed, is the question of whether in all cases where there may be present in the industry yards some industry motive power and equipment, although meticulously operated, according to plan, as here, without interference or interruption to carrier switching, the Commission, nevertheless, has the right to infer "inherent interference and interruption," in the face of uncontradicted evidence that there was no actual interference by industry operation with the railroad movements,[3] and thereby de-

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[2] Another misstatement appears on page 7 of the Motion to Affirm wherein it is stated that "as to the numerous operations conducted within the plant, as performed by three full B. & O. crews." Commission Counsel is well aware that for the period covered by the Commission's report and decision there were only two B. & O. crews or tricks, as found by the Commission's final Report of September 28, 1951, and as conceded at the argument in the Court below. Also, the Court below fell into the same misapprehension and recited such erroneous statements in the Court's opinion. Thus the very basis of the Court's decision rests upon a substantial misapprehension and error and this is another reason, we believe, why this Court should re-examine the principles involved here for the guidance of the Commission and the nation's railroads and industry.

[3] The Commission Examiner made no finding that industry operations interfered with railroad operations, but, on the contrary, specifically found that:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating

prive the industry of all placement, pickup, and switching services by the carrier. Certainly, that is the result of the Commission's order here and, we believe, will be the Commission's policy in future cases if this decision is allowed to stand. We submit, the industry and the railroads of the nation are entitled to have this important question clearly settled and the matter clarified in the interests of all parties concerned.

Another question of importance to the nation's railroads and industry in the instant case is the practice of weighing by the carrier on the industry's scales, operated by a sworn weighmaster subject to the supervision of the Association of Eastern Railroads' Agency, known as the Eastern Weighing and Inspection Bureau. Following universally recognized practices, approved by the Commission itself, the carrier here has on file with the Interstate Commerce Commission a tariff which permits the consignee as a matter of right to request the reweighing of the lading on which freight charges are assessed. The Hearing Examiner found, and the evidence is undisputed, that the reweighing of scrap (the industry's largest inbound volume of freight) is necessary because of the debris and foreign matter in the cars *in order to ascertain accurate weights for freight charges.* Use by the industry of these weights for commercial purposes is incidental to railroad weighing and industry would be entitled to their use even though weighed by the railroad at various points on its own scales. More-

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convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interferenee or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement."

over, as to the outbound cars which are tendered to the railroad without weights, the railroad is obligated to ascertain the weights upon which to assess freight charges, even though the industry uses these weights for invoice purposes.

In the construction of its modern yards the industry here constructed modern railroad scales at the very entrance to the plant property on the track leading from the carrier's main line. Under the Commission approved tariffs, plaintiff industry requested the carrier to reweigh all cars of scrap consigned to the industry. In accordance with the provisions of that tariff, if the discrepancy is *within* what is referred to as the weight tolerance, the industry pays the carrier the charge designated in the tariff for that weighing service; if the discrepancy *exceeds* the tolerance provided for by the tariff, then the industry does not pay for the weighing service and the freight charge is computed in accordance with the weight shown on the reweighing, all in accordance with the approved tariff except that a charge is made under the tariff as above described.

Such type of weighing and reweighing is included in the line-haul freight rate under long established and approved Commission practice.

The positive and uncontradicted detailed evidence is that such weighing and reweighing were done by the railroad on the industry's scales by permission of the industry because it was more advantageous, more convenient, and more economical to the carrier, than if done on the railroad scales near to or remote from plaintiff industry's plant. The evidence further discloses that weighing at any other point by the carrier would have been many times more costly to the carrier and would have involved delays, in many instances of twelve hours or more, as well as other delays due to marshalling cars for the purpose of such weighing at different railroad scales enroute to plaintiff industry's yards.

The weighing was without question for the appellant carrier's benefit and a very different type of weighing than that condemned in Ex parte 104, Part II. It is also true that the kind of weighing that took place in appellant's plant here was held by the Commission to be no obstacle to the inclusion of terminal service in the line-haul rates in the following cases:

In the case of Wickwire, Inc., Terminal Allowance, 274 I. C. C. 307.
In Cancellation Terminal Charges at Decatur, Illinois, 277 I. C. C. 57.
In the case of Interlake Iron Corporation Terminal Allowance, 245 I. C. C. 437.

Thus we believe and submit it will be seen that the summary and arbitrary action by the Commission regarding the weighing in the instant case, are the result of reliance upon the same type of superficial and inaccurate statements as appear in the Commission's Motion to Affirm before this Court.

The third important question as erroneously decided by the Commission and the Court below is that the carrier was not obligated to deliver scrap in Yard 300, or on Track 500, or in Yard 500, or on Track 110, dependent upon the availability of space at each of the locations; that variable points for delivery would require direction and control by the industry without reference to carrier's operating convenience, and in many instances, additional movement in order to reach the point of placement.

There is no substantial evidence that the circumstance of there being four distinct points of placement of scrap occasioned interference or delay in the delivery and placement of scrap. On the contrary, the evidence is clear and undisputed that the point of placement was predetermined in each instance and that in each instance, one movement and one placement only was required to be made by the railroad. As far as the railroad was concerned, there were no *variable* points of delivery although there were *various*

points of delivery. The choice of any of these yards or tracks was never left to the railroad but was an industrial function, which once performed, converted such point into a fixed point involving only one movement and one placement on the part of the railroad, at its own operating convenience as to time and method.

Such a designation by the industry yardmaster on a written switch list of the yard of delivery when the freight cars first arrived at the industry plant did not result in *variable* points of delivery. Such designation of a delivery point is in reality no different from the designation of separate warehouse doors or unloading stations at the smallest industry siding or team track. Actually, the predetermined point of scrap delivery involved here resulted in a smooth plan of operation, at the carrier's convenience, and certainly with no interference, interruption, or delays by industry motive power or equipment, or otherwise.

It is thus clear (and contrary to what Commission Counsel would have this Court believe) that there are no *variable* points of delivery which resulted in "evidence of plant disability" and "evidence of multiple movement of cars within the plant." (Motion to Affirm, page 9). Such an argument and conclusion is clearly unsupported by the evidence, contrary to the evidence, and contrary to the Hearing Examiner's findings.

The fourth question, and one on which Commission Counsel heavily dwelt on in his Motion to Affirm (page 8 and 9), has now become moot by reason of the industry's discontinuance of the manufacture and shipment of this type of steel. Again taking a summary view of the circumstances involving the movement of cars for the loading of ingots on one special track (315C), the Commission ignored the determining factor that the ingot switching, when done by the carrier, was always done as a part of an integrated movement with other switching not found to be improper,

and performed completely at the carrier's convenience. Any other placement of empties for ingot loading or removal of loaded cars of ingots was done by the industry motive power. Thus, this particular finding and conclusion of the Commission properly should be removed from this Court's consideration as a basis either for affirmance or reversal of the decision.

It is regretted, but it appears necessary to call attention to other instances of lack of candor and erroneous statements in the Motion to Affirm. On page 11, Commission Counsel assert that appellant's contend: "that a recommended examiner finding is the final legal decision, under application of the Interstate Commerce Act, which cannot be overruled by the Commission. That is untenable and contrary to all previous interpretation and understanding of the purpose of Congress in vesting final administrative authority in the Commission. Approval of such a theory is not to be found in court decisions."

Such a statement by Commission Counsel is clearly beyond the bounds of fairness and can only serve to confuse the issues before this Court. Appellant industry most seriously maintains that the Commission in the instant case clearly failed to recognize and to apply the principles stated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Plaintiff appellant also most seriously urges that the Court below fell into the same error, induced by similar inappropriate representations of Commission Counsel, and that error and misapplication of the principles of the Administrative Procedure Act by the Interstate Commerce Commission in this and similar cases should be reviewed and examined by this Court in the interests of all parties concerned.

Another instance of specious and unwarranted representation by Commission Counsel appears in the Motion to Affirm, at pages 5-6, wherein it is stated that:

> "... plaintiff has misconceived the established principles relating to terminal switching, and, in attempt-

ing to interpret the switching facts at its own plant, has assumed authority to make such fact findings as to what is plant service as distinguished from transportation service, and as to where transportation begins and ends at its plant. This may be accounted for by partisan interest inspired in part by railroad support, such as has extended to the dispensers of great traffic involved in the many Ex parte 104 cases decided by this Court. It is the authority of the Commission, not of the industry and carriers concerned, or even of the courts, to make such decisions upon the facts relating to switching conditions at a particular industrial plant. United States et al. v. Wabash R. R., et al, 321 U. S. 403, 407-409."

What Commission Counsel means by partisan interest of the industry is not clear, for obviously the industry is interested in receiving complete transportation, including lawful terminal switching. It neither misconceived the principles applicable nor assumed the prerogative of the Commission. It knows the factual situation at its plant as well as the Commission. It has undertaken to apply the established principles to these facts (which are of record), logically and reasonably. The Commission and its Counsel have applied general abstract principles not to the precise factual situation of record but to assumed general factual situations experienced in other Ex Parte 104 cases which this Court has affirmed, facts different from those in this case. Hence, we insist with complete justification that the Commission's decision is contrary to the evidence in this case, not supported by established evidence, and contrary to law.

The statement that our alleged misconception and alleged erroneous assumptions are in part railroad inspired, with the implication that that is so because we dispense traffic, is, we submit, unfair and unwarranted. The Baltimore and Ohio Railroad is the only carrier serving the plaintiff industry's plant, is the only carrier which would necessarily carry and route all traffic originating at and delivered to the plant, and nothing in the record or the circumstances

of the traffic movement supports Counsel's implicit charges.

A further and real consideration, of which it is believed this Court should take notice in this case, is the declared National Transportation Policy as embodied in 54 Stat. 899, preceding Section 1 of the Interstate Commerce Act, 49 U. S. C. par. 1.

The questions here are raised with respect to that portion of the policy providing for fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each. The result of the Commission's order is to foreclose the industry from receiving from the railroad complete transportation service which is inherently best suited to its needs under present conditions under the line-haul rate, in a case such as this where every effort has been made by the railroad and the shipper to bring the service within standards prescribed by the Commission and where the facts undisputably show that the service so rendered meets such tests. The Commission, by disregarding the evidence and arbitrarily decreeing such service to be in excess of that contemplated under the line-haul rate, is creating a situation tending to disparage the advantages of railroad transportation to this industry, and thus is embarking on a course which the National Transportation Policy sought to enjoin.

The tenor of the motion to affirm filed in this case demonstrates the propriety of appellant's observations in its Statement as to Jurisdiction wherein in pointing out the importance of the questions presented by the appeal, appellant stated:

> "The question is of paramount importance because the instant case is an illustration of how indiscriminate exercise of such a power by the Commission, motivated perhaps by an excess of zeal to eliminate abuses—and emboldened by general court approbation of its action in certain cases—may achieve quite a contrary result and lead to the very abuses sought to be eliminated."

Thus the Commission in support of its motion to affirm cites at page 6 the pronouncement of this Court in *United States et al.* v. *Wabash Railroad et al.*, 321 U. S. 403, as the seeming authority for the uncontrolled power of the Commission to determine "the point of time and space at which the carrier's transportation service ends" even to the exclusion of the Courts, *but fails to point out the limits* upon that power imposed by this Court in the cited case and in other cases, namely, that "its findings on that question will not be disturbed if supported by the evidence".

Although appellant concedes the power of the Commission to so determine transportation if validly exercised, appellant contends that in the instant case the exercise by the Commission of that power was in disregard of the safeguards imposed upon it by the Court in that its findings forming the basis for its determination were not supported and were arbitrary.

Although for jurisdictional purposes appellant has advanced such want of evidentiary support as its main ground for appeal, appellant submits that the importance of this case is far greater than in the mere testing of the correctness of a Commission decision. It should be borne in mind that the facts as disclosed by the evidence and as they describe the operations of this railroad with relation to the industry involved are uncontradicted. The question presents itself whether the Commission may hold virtually as a matter of law that a plant operating in a manner disclosed by such uncontradicted evidence is not entitled to terminal switching as part of the line haul rate. Particularly the following questions present themselves:

1. The uncontradicted evidence being to the effect that appellant industry has its own motive power which operates concurrently with railroad power and that such concurrent operation takes place without industry power interfering with railroad power, under such circumstances may the Commission as a matter of law deny appellant industry terminal switching on a theory of inherent interfer-

ence—a theory which the Commission itself has disclaimed in cases decided by it? If so, this appellant industry and other industries similarly situated are entitled to a clarification by this Court.

2. The evidence being uncontradicted that the weighing performed by the railroad on the industry scale is of the type which the railroad by its tariff provisions would be bound to perform under the line-haul rates if performed by it on its own scale; the evidence further showing the weighing on industry scale to be more economical and more time saving than if performed on the railroad scale, and consequently for the railroad's benefit: under such circumstances may the Commission hold that the mere circumstance of the weighing taking place on the industry scale creates an interruption and interference rendering the terminal switching an industry operation? If so, this industry and other industries similarly situated are entitled to a clarification by this Court.

3. The evidence being uncontradicted that the placement of inbound scrap takes place at four predetermined locations and that the determination of these locations is never left to the railroad in the sense that it would entail delay or interruption of movement, under such circumstances may the railroad on the mere ground of their being more than one place of delivery of the same commodity deny to industry terminal switching? This is likewise a question that requires clarification by this Court.

4. With respect to outbound ingots the evidence being undisputed that although several switches were made of cars in a day's operation, such switching was integrated with other switching in the vicinity and there being no evidence of delay specifically occasioned by such multiple switching; under such circumstances may the railroad deny to the industry terminal switching of outbound ingots and, if such denial be warranted, may the industry operation be

penalized by being denied switching with respect to inbound and outbound shipments generally?

All these questions are questions of substance and should not be summarily disposed of by a motion to affirm as requested by Appellee.

Finally, in reply to the contention that the Statutory Court carefully examined the evidence and found it to afford substantial support for the Commission's findings, it is respectfully submitted that although the Court may have read the evidence it was influenced in its decision less by the evidence of record than by an erroneous statement made in the course of the oral argument by the Commission's Counsel, to the effect that the Railroad employed three crews—which in fact it did employ at a time subsequent to that covered by the hearing and testimony—implying the necessity of that number of crews to handle the volume of freight disclosed by the evidence to have been handled at a time when only two crews were employed. This erroneous finding—the only specific finding of fact made by the Court—was virtually used by the Court as its "ratio decidendi" for sanctioning the Commission's order. Thus the entire decision of the Court rests on a conception of a nonexistent factual situation and raises a valid doubt as to the accuracy of the Court's conclusion generally of evidential support of the Commission's findings.

For these reasons it is urged that the motion to affirm should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 358

COPPERWELD STEEL COMPANY,
Plaintiff-Appellant,

AND

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Intervener-Appellant,

VS.

UNITED STATES OF AMERICA,

AND

INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF OF INTERVENER-APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

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The Daily Record Co., Baltimore 3, Md.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF OF INTERVENER-APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

PRELIMINARY STATEMENT

This case is pending on direct appeal from a final decree of a statutory three-judge United States District Court for the Western District of Pennsylvania dismissing the complaint of appellant, Copperweld Steel Co.,[1] in an action

[1] Sometimes afterward referred to as the industry.

brought to set aside and annul an order of the Interstate Commerce Commission which directed The Baltimore and Ohio Railroad Company,[2] intervener-appellant, to cancel tariffs by which they proposed to pay the appellant an allowance for performing for the railroad's account car switching at the appellant's plant in Warren, Ohio.[3]

QUESTION PRESENTED

At the outset, appellant railroad points out that it has regarded the appellant industry's plant at Warren, Ohio, free from any disability within the meaning of the principles developed in Ex Parte 104, Part II, *Propriety of Operating Practices — Terminal Services,* 209 I.C.C. 11 (1935) and subsequent cases, which would preclude the railroad from performing switching services at the line-haul rate.

The Commission counsel in the Motion to Affirm apparently imputes to the railroad improper motives for its performance of terminal switching services at the industry's plant and for its support of the industry's position in this case, because superficially it appears the railroad will benefit from being relieved of the obligation to perform the terminal switching service. Because of this inference the railroad feels it necessary to bring to the attention of the Court the circumstances which motivate its action.

The railroad feels it has the duty, and the right, to perform a complete transportation service at the line-haul

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[2] Sometimes afterward referred to as the railroad.

[3] There is no question as to the propriety of the railroad paying an allowance to the industry in lieu of performing the terminal switching service. Interstate Commerce Act, 34 Stat. 590 (1906) as amended, 49 U.S.C. Sec. 15, par. (13); *United States v. Balto. & Ohio R.R. Co.,* 231 U.S. 274 (1913). The amount of the allowance has been found reasonable by the Interstate Commerce Commission. *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 269 I.C.C. 323 (1947).

rate, including receipt and delivery of freight at reasonably convenient locations within the plant. Railroads today are operating in a highly competitive field. Motor carrier competitors, without restraint or restriction, can and do perform a complete transportation service including plant platform receipt and delivery of freight.

The *Ex Parte 104* principles, promulgated by the Commission as a guide or rule of conduct for railroads, have been interpreted by the appellant railroad as not precluding the complete transportation service mentioned, including placement and removal of cars from reasonably convenient locations in the industry's plant under the line-haul rates.[4] The railroad considers such service as fulfillment of its common carrier duty since it is satisfied the plant is free of physical disabilities and the switching could be and was performed in a continuous movement without interference or interruption on the part of the industry.

The Commission has disagreed. Consequently, the issue presented to this Court is not the lawfulness of the principles, nor the application of those principles resulting in a prohibition of terminal switching to a state of facts which warrants such application. The issue before this Court is whether the precise factual situation in this case supports the Commission's conclusion that the switching service violates these principles and whether the Commission's conclusions are contrary to the uncontradicted evidence.

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[4] In the Motion to Affirm it is said that railroad and industry unjustifiably took it upon themselves to make this determination. This statement was made in the face of the often stated conclusion of the Commission confirmed by the courts that the principles are clear and understandable and completely susceptible of observance by ordinary laymen, certainly by experienced railroad personnel.

This Court is not asked to weigh the evidence and resolve questions of fact, nor is it asked to substitute its judgment for the Commission's in determining at what point the railroad's transportation duty at the line-haul rate begins and ends.

What the Court is asked to do in this appeal is to decide as a matter of law that there is no substantial evidence to support the Commission's findings and conclusions that the switching service is contrary to the established *Ex Parte 104* principles which have had the approval of this Court, and that the Commission's conclusions and findings to that effect are not adequate and are completely contrary to the evidence. The statutory court committed error in not so holding. The opinion of that court is limited to the general finding of law that the Commission's order is supported.

The discussion of the issues and of the evidence of record will disclose the substantiality of the questions presented which it is submitted clearly shows the justification and necessity for complete argument before the Court for disposition of the appeal. The Motion to Affirm should not be granted.

The traffic inbound and outbound at the industry's Warren, Ohio, plant may be divided into four groups for the purposes of the questions presented in this proceeding:

A. Inbound scrap which is check-weighed and the cars weighed light on the industry scale and which may be delivered to more than one location in the plant;

B. Outbound ingots and plant-produced scrap which is weighed initially on the plant scales;

C. Outbound ingots which are pulled from the loading location more than once a day;

D. All other inbound and outbound traffic.

All of these groups have different "switching facts" for purposes of this proceeding and, therefore, necessarily require separate findings to determine if the switching of each one of them does or does not conform to the dictates of the Commission in the *Ex Parte 104 cases.* This the Commission has failed to do in its final report in this proceeding, *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 283 I.C.C. 327 (1951). The decision of the three judge statutory court was equally lacking. Both relied on a recitation of some very general facts, many not directly bearing on the issue involved, and found the entire switching arrangement by the railroad unlawful. The Commission did criticize the inbound weighing of scrap and the multiple "drags" from the ingot loading track, but neither criticisms apply to the other two groups at all. There is not a single finding in the report, nor shred of evidence in the record, which could conceivably support the ultimate finding as to the latter two groups. In such circumstances this court very definitely has substantial matter before it in this appeal.

Nothing in the foregoing is intended to concede that switching at the industry's plant on any of the four groups is unlawful. The decisions of the Commission and of the three judge statutory court in all important respects are not supported by substantial evidence and represent a misapplication of the *Ex Parte 104* principles.

Both the industry and the railroad have said that they do not question the principles governing the propriety of railroad performance of industrial terminal switching services as laid down in the *Ex Parte 104 cases.* They stand by that position. The fact that this court has many times approved the application of these principles to specific fact situations not unlike those for which they were promulgated to control, and which resulted in forbidding the per-

formance of terminal switching service at the line-haul rate, does not in any way control or minimize the quality of "substantial" in the matter presented for review here. It is not the principles of which appellants complain but the matter of application. Application to a factual situation giving rise to conditions completely different than that for which they were promulgated to control is not proper exercise of the authority which this Court has stated was the function of the Commission. Such improper exercise of authority invalidates the order.

ARGUMENT

The Decisions of the Commission and of the District Court Are Not Supported by Substantial Evidence with Respect to the Switching of Inbound and Outbound Commodities.

The Ex Parte 104 *Propriety of Operating Practices — Terminal Services case, supra,* held that the basic determinative test of the extent of the carrier's terminal switching duty under its line-haul rates is whether a carrier can deliver and receive carload freight at the delivery and loading locations in a plant area in a continuous, uninterrupted movement at its operating convenience. A continuous movement has been defined as a movement between the carrier's tracks and the receiving and delivery points, in a plant, without any delay, or any suspension or break in time, or continuity of movement for which the industry is directly responsible, *American Chain & Cable Co., Inc., Terminal Allowance,* 277 I.C.C. 399 (1950).

In the first report in this proceeding, *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 269 I.C.C. 323 (1947), the Commission found at pages 341-342:

> "We find that it is the duty of respondent to deliver at the line-haul rates commodities contained in cars that are not weighed on the industry's scales, and cars

that are weighed on the industry's scales, provided they have not been previously weighed and are not moving under weight agreements with the consignors, from the east on tracks numbered 104, 315, 207, 208, 210, 212, 214, 217, 219, and 220 and from the west on tracks numbered 114, 115, 217, 220, and 225, all as described herein, and provided further, that respondent is permitted to perform these services without interruption or interference by the industry's engines.

"We further find that it is respondent's duty, at the line-haul rates, to receive cars loaded with bars and/or billets on track 101 and that part of track 200 west of the junction of tracks 101 and 200, all as described herein, provided the loaded cars are moved out of the plant in a continuous movement without any interruption caused by weighing them, except as hereinafter provided, or by circumstances or conditions for which the industry is directly responsible. The weighing on the industry's scales of out-bound loaded cars that do not pass any scale station enroute to destination and are not moving under weight agreements with the consignor shall not be considered an interruption or interference or a break in the continuity of the movement."

The record before the Commission at the time of this report contained clear and uncontradicted evidence that the switching could be and was accomplished in a continuous movement without interference from the industry, and the Commission recognized this in its decision except as to the question of weighing. Weighing will be taken up here separately in a later section.

A further hearing before the Commission was had on petition of the industry and the railroad to present additional evidence supporting elimination of the switching restriction on outbound shipments to bars and billets since the industry is equipped to manufacture a wide range of steel articles and its end products change with market

demands. Reconsideration of the question of weighing was also requested.

The evidence before the Commission at this hearing was also uncontradicted that the switching performed by the carrier was simple, efficient and continuous without interruption. The carrier submitted a very detailed resume of a typical day's switching operation (R. 698-722).[5] The only interruption noted was one lasting "not over a minute and a half". It is clear that such interruption cannot be characterized as repetitive or as inherent in the physical layout or operation of the industry.

Several representatives of the Interstate Commerce Commission also conducted a study of the switching service performed. This study was for a period of six days. The entire operation, both by the respondent in the placement and removal of cars to and from various places in the plant and the intra-plant operations of Copperweld by its own power and crews, was fully observed by the Commission representatives (R. 297-346, Ex. 30 to 33 inclusive). The reports of these inspectors corroborate the industry and railroad evidence that the switching by the railroad is performed at its own convenience, without interruption or interference by the plant operation, and is performed in a continuous movement. During the six-day period only four instances of any delay were reported. The total delay for all four instances amounted to only 27 minutes (Ex. 31). These instances do not furnish evidence that respondent can not switch the Copperweld plant without interruption. They are isolated instances which prove the rule. The fact that in an entire week of operation only these four slight delays were encountered is sufficient to prove that

[5] "R" references are to the record of testimony before the Commission at the April 19-21, 1950 hearing. Exhibits are cited "Ex" and were submitted into the record at the same hearing.

respondent's switching is uninterrupted by industry operation.

The Hearing Examiner in his proposed report, at sheets 7-8, recommended findings as follows:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interference or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement. While the switching performed on outbound ingots from track 315C is integrated with other switching in the vicinity of that track, it is apparent that the frequent and what may be termed special services in connection with the switching of ingots from track 315C are for the benefit of the industry and are in excess of the services respondent is obligated to perform at the line-haul rates. At no other point in the plant is more than one pull a day required of an outbound load from the loading spot."

Despite the clear and uncontradicted evidence of record, Division 3 of the Commission, in its final report, found all switching service beyond yard 100 outside of the railroad's obligation at the line-haul rate. *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 283 I.C.C. 327 (1951).

The foregoing resume is given for the purpose of showing that there was considerable support within the Commission

and by the expert trial examiner for appellant's view of the evidence. Such situation, coupled with appellant's earnest contention that the record affirmatively and overwhelmingly shows the railroad's switching operation to be lawful, lends considerable force to the contention that substantial matter exists for review by this Court. Leaving the question of inbound scrap and outbound ingots aside for the moment, the Commission has not made adequate findings based on substantial evidence on the record considered as a whole to sustain their ultimate findings that the switching service performed by the railroad is unlawful. It could not do so, for the record does not contain any evidence to support such finding.

Certain unwarranted statements have been made in both the Commission's final report, supra, and in the three judge court decision obviously intended to be in the nature of primary findings in support of the ultimate findings, but which can not be given weight because of their nature.

At page 329, the Commission said:

> "* * * Practically all of the parts of the tracks used for loading and unloading traffic moving into and out of the plant are in front of, behind, or between parts of the same tracks used for loading and unloading intra-plant traffic."

Such statement, creating an inference of interference, gives no support whatever to the finding that the switching can not be performed to these locations in a continuous uninterrupted movement without interference, in the face of uncontradicted detailed evidence of such movement.

The only interference in the railroad's switching operations which the Commission was able to suggest was apparently what it considered potential interference. At page 332 it was said:

> "* * * Interference by industry power or equipment is inherent where, as here, switching is being performed concurrently by respondent and the industry."[6]

In addition to the record showing affirmatively that there is no actual interference by the industry with respondent's switching, such finding is unwarranted in that it is contrary to developments made in the terminal switching principles in the *Ex Parte 104 cases. Standard Oil Co. of Louisiana Terminal Allowance*, 266 I.C.C. 437, 447 (1946). In the *Standard Oil* case the Commission dismissed potential interference as a ground for denying the right to service at line-haul rates in the absence of a showing of actual interference.

In the decision of the statutory court, weight is seemingly placed upon the size of the industry yards and the time required of respondent to perform the switching. Such findings, without more, do not lend support to the Commissions's ultimate findings since they are contrary to the principles enunciated by the Commission itself in the first *Ex Parte 104 case, supra*, where it was said at page 43:

> "* * * Manifestly it is not the amount but the kind of service required which must be considered in de-

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[6] The Hearing Examiner made no such finding of fact. His findings completely negate even an inference of potential interference. At sheet seven of the Examiner's proposed report, it was said:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interference or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement."

termining whether the performance of such service is an obligation of the carrier under its line haul rates."

The industry yards were designed with the help of the railroad's engineers with the particular objective to make the switching operation simple and to eliminate any interference with a continuous switching movement. Switching the number of cars delivered and received daily from Copperweld to many smaller industries with simple siding arrangements would undoubtedly take more time and involve more train mileage than is necessary here.

Furthermore, the finding of the court that three crews were utilized by the railroad is related to another finding that an average of 50 cars daily were handled in the industry's plant. The record shows that only two crews were used to handle the average of 50 cars a day to which the court alluded. A pleading filed by appellant with the Commission, subsequent to the Commission's decision and order of September 28, 1951, seeking reconsideration because of changed conditions, asserted that a third crew had been added by the railroad. This was so because of an increase in the industry's business and in the number of cars handled inbound and outbound. In summary, two crews handled the average of 50 cars; three crews were put on to switch a larger number.

Aside from the statements mentioned and a very short and incomplete resume of the switching operation, the three judge court did not review in its decision, the "substantial evidence" which it considers supports the Commission's decision. It relies entirely on such general statements as:

> "* * * However, what is preserved in the record satisfactorily discloses that the Commission's substituted findings were compelling (ly) justified." (Page 3 of mimeographed decision).

"The Court could not overlook the glaring incongruity of plaintiff's position * * *" (Page 4 of mimeographed decision).

None of the facts mentioned in the court opinion go to support the essential issue in the proceeding as to whether the carriers switching operation is within the confines of the principles of the *Ex Parte 104 cases.* It is not what operations are performed that control, it is how these operations are performed. The District Court has failed entirely in supporting its ultimate conclusion that the Commission's decision is supported by substantial evidence.

The Use of the Industry Scale for Weighing Inbound Scrap and Certain Outbound Commodities Is for the Benefit of the Railroad.

The Commission's finding that weighing of inbound carloads of scrap constitutes interference and interruption ironically is contrary to the best interests of the railroad, which interests the *Ex Parte 104* principles were designed to protect. The record in this proceeding contains detailed and convincing evidence to the effect that the railroad of its own choosing uses the industry's scales because such use is quicker, more efficient and less expensive than use of railroad scales.

The industry has for some time been experiencing a great deal of difficulty with short weights in scrap shipments due principally to debris and foreign matter from other ladings found in the cars. Consequently, the industry under tariff provisions has instructed the railroads serving Warren to check-weigh inbound carloads of scrap to determine the accurate weight of the lading so that proper freight charges will be assessed. Necessarily the empty car must also be weighed. The industry uses the weight ascertained by the railroad for its own purposes also, which

it would do even if the weights were obtained on railroad scales. This is not a special service to the industry. It is a service which the railroad holds itself out to perform, upon request, by tariff provision duly filed with the Interstate and State regulatory commissions. A charge is made for each weighing if the net weight is within tariff tolerance. If it is not within tariff tolerance no charge is made for either weighing.

The request of the industry for reweighing is amply justified by its experience. The record contains detailed evidence of this experience both as to overcharges and undercharges on scrap and as to the amounts paid the railroad for weighing services (Ex. 41 and 42).

If the railroad were refused the use of the industry scale, it would be forced to use its own scales, none of which are near Warren. The use of any of these scales would entail extra expense, inconvenience and delay to the railroad. The record contains detailed evidence of the location of the railroad's scales and the disadvantages entailed in their use for weighing Copperweld traffic both inbound and outbound (R. 744-749).

Considering that the railroad is obligated to perform the weighing as part of its common carrier duty, it can not be said that the use of the industy scale is for the industry's benefit when the advantages to the railroad of such use are considered. It most decidedly is for the railroad's benefit and as such it can not be an interference or interruption in switching operation caused by the industry.[7] It is in-

[7] The Examiner did not find that weighing or reweighing of inbound scrap constituted interruption or interference. At sheet 6 of his proposed report, the Examiner described the weighing procedure and stated:

> "* * * The reweighing of cars of scrap is necessary because of varying amounts of debris and foreign matter remaining in the car from previous ladings having no relation to the scrap delivered to the industry."

dustry caused interruptions only not carrier caused interruptions, which are said to terminate the railroad's line-haul duty under the *Ex Parte 104* principles. The check-weighing involved here is not in violation of the *Ex Parte 104* principles.

If the railroad performed the weighing operation at its own scales, there could not be any question of interruption or interference. Under such circumstances the appellant railroad contends the Commission's finding with respect to weighing is unwarranted and is contrary to previous decisions of the Commission in situations exactly the same in the important respects: *Cancellation Terminal Charges at Decatur, Ill.*, 277 I.C.C. 57 (1950); *Wickwire Bros., Inc., Terminal Allowance*, 274 I. C. C. 307 (1949); and *Interlake Iron Corporation Terminal Allowance*, 245 I.C.C. 437 (1941).

What has been said regarding the check-weighing of scrap applies equally to those commodities which are weighed outbound by the railroad on the industry scales. The cars are tendered without weights. This is the initial weighing which is the carrier's obligation and duty to perform in order to compute freight charges. *In Re Weighing of Freight By Carrier*, 28 I.C.C. 7 (1913). The commodities in question are ingots and plant-produced scrap. The same disabilities to the use of the railroad scales when compared with the use of the industry scale exist here as they do with respect to inbound scrap. In addition, there is the possibility that dangerous overloads would be carried many miles before detection, endangering lives, equipment and roadbed.

The use of the industry scale is a simple and efficient, switching operation. The scale is located on the incoming track. The weighing is accomplished without any backward movement, or double movement, and requires 45 seconds to one minute per car (R. 427).

The weighing phase of the Commission's decision is certainly unwarranted in that it is directly opposed to other recent decisions, cited above, in the *Ex Parte 104* series. The finding that the weighing is for the benefit of the industry in the restricted sense that phrase is used in the *Ex Parte 104 cases* is entirely unsupported by the record. The weighing is a common-carrier service required of the railroads on demand. It could be performed at a railroad scale at much greater inconvenience and expense to the railroad without penalizing the industry of its rightful switching service. The weighing is for the benefit of the industry, only in the same sense that the line haul is for its benefit.

The Delivery of Scrap to More than One Location at the Industry's Plant Does Not Subject the Railroad Switching Operation to the Control of the Industry, nor Does it Inconvenience the Operating Efficiency of the Railroad.

The Commission in its final report, *supra*, at page 334 in discussing delivery of scrap said:

> "* * * Variable points for delivery would require direction and control by the industry without reference to carrier operating convenience and in many instances, additional movements in order to reach the point of placement."

This finding totally ignores the evidence of record. In all cases of plant switching the shipper has the right to, and must, tell the carrier where to place the car. This can not be said, and has never heretofore been held to constitute "direction and control by the industry". In this case the industry informs the railroad each day which yard or track on which it desires to take delivery of scrap, either yard 300 or track 500, and in rare instances track 110. The railroad switching crew is informed of the scrap delivery

location desired that day immediately upon entering the plant, before the day's switching operations are commenced. There is no possibility of extra movements by the railroad crew from one location to another because one location is full. The tracks are checked each day by the industry, before the incoming train arrives, to determine which location is available. Tracks 500 and 110 are intermediate to yard 300 and may be serviced by the railroad at all times in a continuous movement and without interference or interruption. Such facts were clearly shown by both the railroad's description of switching operations and by the Commission's inspectors' report. Clearly there is no evidence to support the Commission's finding that the railroad's operations in the delivery of scrap would be under the direction and control of the industry.

The Fact That Ingots Outbound Are Switched More Than One Time from the Loading Location Is Not Necessarily Contrary to Established Principles.

The Commission found that the switching of loads of ingots from the loading location more than once a day was a "special service" for the benefit of the industry and, therefore, not included in the line-haul rate. This finding as to "special service" is not supported by substantial evidence and is arbitrary in that it is not in conformance with the established principles promulgated by the Commission to govern performance by railroads of terminal switching services at line-haul rates.

The evidence is clear and uncontradicted that the switching of track 315C, where the ingots are loaded, is conformed with other switching operations in the same plant area and is performed at the convenience of the railroad. The Commission recognizes this for it finds switching on outbound

ingots from track 315C integrated with other switching in the vicinity of that track. Under such circumstances there is no basis for the Commission's finding that the service is "special service".

The Commission has never heretofore set a hard and fast rule forbidding a carrier to make more than one switch a day at the line-haul rates. To the contrary, in *Standard Oil Co. of Louisiana Terminal Allowance*, 266 I.C.C. 437, 458 (1946), the Commission said:

> "* * * It is not intended here to lay down any rule that not more than one switch a day may be made by a carrier at the line-haul rates. Whether a carrier is justified in doing so must be determined by the facts and circumstances attending and surrounding each particular plant or point in the plant. *Spencer Kellogg & Sons, Inc., Terminal Service*, 262 I.C.C. 205, *Archer-Daniels Midland Co., Terminal Service*, 259 I.C.C. 455 * * *."

In this same *Standard Oil Case* the Commission, in two instances, approved more than one switch a day to specific loading and/or unloading points. It was held that at the butadiene building more than one switch a day "would not be in violation of the act, provided that a full complement of four cars is handled in each previous switch made on the same day" (pp. 452-453). In this case the capacity of track 315C is two cars, and the "full complement", two cars, is pulled at each switch. Referring again to the *Standard Oil Case*, two or more switches were authorized for district 10 "when the volume of traffic warrants" (p. 444).

In any event the finding made as to ingots, even if it were sustainable, would not help to support the finding of unlawfulness as to any of the other switching operations either inbound or outbound, or to the switching of any

other product, or even to ingots switched from other locations where only one "pull" a day is necessary.

Moreover the industry has discontinued the production and shipment of ingots. The industry does not intend to re-engage in the shipment of ingots because of the addition of more finishing facilities.

It Is Well Settled That This Court Will Review Orders of the Interstate Commerce Commission, Allowing Full Argument, Under Circumstances Such as Are Present in This Case.

The Court in reading this brief in opposition to the Motion to Dismiss may note that very few decisions of this Court are discussed or cited in support of appellant's contentions and arguments, particularly since the Motion to Affirm lists a number of cases decided by this Court stated to be in support of either the Commission's or Statutory Court's decisions. This appellant has not felt it necessary to discuss those cases to show that they do not support the Commission's decision in this case, nor to differentiate the holdings in those cases from the decision we are asking of the Court here. That is so because what this Court in effect has held in those cases is that it is the function of the Commission to determine under the approved *Ex Parte 104* principles where line-haul transportation begins and ends. We do not quarrel with the Commission on that proposition. In the cases cited in the Motion to Affirm, this Court has held that such determination by the Commission must be supported by substantial evidence. We regard that proposition as well settled. As we stated at the outset, the substantial question presented here is whether the Commission's findings in this case are adequate and whether they are supported by substantial

evidence considering the record as a whole. *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474 (1951), *Florida v. United States*, 282 U.S. 194 (1931).

In this connection (the review of the Commission's order), it is deemed sufficient to call to the attention of the Court its decision in *Int. Com. Comm. v. Union Pacific R.R.*, 222 U.S. 541 (1912). It was therein stated at page 547:

> "* * * the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

And again at pages 547-548 the court said:

> "* * * 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof — but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Appellant railroad is aware that this Court in *I.C.C. v. Mechling*, 330 U. S. 567 (1947) at 574 stated that:

> "Judicial review of the findings of fact and expert judgment of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited * * *."

However, within that limitation, the Court must set aside the Commission's order if it contravenes the rules laid down in the *Union Pacific* case. That is what this Court did in the *Mechling* case. Appellant railroad submits that the instant record likewise presents a situation where the Commission's order should be set aside because the order is not supported by adequate findings, is contrary to the evidence, is without evidence to support it, is arbitrary and for these reasons unlawful.

CONCLUSION

From the brief references to the evidence of record before the Commission and the statutory court in this case and from the discussion of the issues raised on appeal, the railroad believes it has been made apparent that the issues presented are substantial and should be reviewed by this court.

It has been demonstrated that the Commission's findings with respect to weighing, delivery of scrap and pick-up of outbound ingots are not supported by substantial evidence considering the record as a whole.

Further, it has been shown that even if the Commission's findings that weighing; delivery of scrap to more than one location; and more than one service per day to ingot-loading locations are considered sustainable as disabilities to a lawful switching operation, these findings are not sufficient to support the blanket prohibition of all terminal switching

at the line-haul rate. The industry receives inbound, and ships outbound, many other commodities which are not subjected to any of the conditions listed above. The record does not contain even a shadow of evidence that any disability pertains to their receipt or delivery. To the contrary the record affirmatively shows no disability to be present. Under such circumstances this court is presented with a fundamental question of the lawfulness of an administrative decision, which is based not on the evidence of record but on the undiscrimate application of general principles and therefore is not confined to this case alone, but is one of general importance and one to which this court has ever been sensitive to protect.

The Commission's decision in this case has the effect of artificially hampering the railroad's efforts to remain competitive with other forms of transportation. It has been forbidden by this decision to perform the complete, wholly lawful transportation service which it is eminently suited to perform. Railroads are best suited in many respects to serve a large part of the transportation needs of heavy industry, such as the Copperweld Company, if they are permitted to render a complete service including delivery to loading and unloading locations. However, if they are not permitted to do so, their natural advantages are largely nullified and other forms of transportation service become more attractive to the shippers. Such a result is a direct violation of the mandate of the National Transportation Policy which seeks to preserve in all forms of transportation the advantages inherent in each for the ultimate good of the national interest and the private interest of both the transportation agencies and the users of such agencies.

WHEREFORE, it is respectfully requested that the motion to affirm be overruled.

Respectfully submitted,

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